TESTING THE RELIABILITY OF THE LAY HANDWRITING WITNESS. — Since the value of opinion evidence rests entirely upon the degree of accuracy which the witness's special skill or peculiar knowledge gives to his conclusions, and since juries tend to give undue credence to unsupported statements of opinion, no test should be forbidden which, by displaying the ability of the witness to deal with the problem under investigation, throws light upon the true value of his testimony. The untrustworthy nature of lay opinion evidence as to handwriting [1] makes this especially true in that case.[2] Yet a recent North Carolina decision holds that such a witness cannot be tested on cross-examination by being asked to pass upon the authenticity of specimen genuine and forged signatures, though their authorship be proved in a manner that would make authentic signatures admissible for the purpose of comparison in the direct examination. *Fourth National Bank of Fayetteville* v. *McArthur*, 84 S. E. 39.[3]

Such a result, from the layman's point of view, must no doubt seem a palpable error. The principle underlying all evidence as to handwriting is that all the signatures of any one individual display common distinguishing characteristics. Hence the estimation of the authenticity of specimen true and forged signatures of the reputed author displays specifically the ability of the lay witness to identify the signatures of that particular person, and thus provides an exceptionally accurate test of the merit of his opinion.[4] In addition, this test is the only means whereby the value of his testimony can be satisfactorily determined; for with a lay witness who employs the principles of no science, recourse cannot be had either to professional reputation or an examination as to scientific understanding.[5] Finally, as the judging of hand-

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imum wages. § 40 (*b*). Rural Workers' Union *v.* Maldura Branch, etc. Ass'n, 6 C. A. R. 61. And to determine a great variety of the conditions of employment. Merchant Service Guild *v.* Com. S. S. Owners' Ass'n, 6 C. A. R. 6. In order to facilitate arbitration organization of labor is indispensable. See Australian Tramway Employees Ass'n *v.* Prahran, etc. Trust, 6 C. A. R. 130, 143. Accordingly, the act provides that neither employer nor employee may refuse to offer or accept employment because the other is a member of an organization. §§ 9, 10. And the court may decree that preference be given union men. § 40 (*a*). Australian Tramway Employees Ass'n *v.* Prahran, etc. Trust, *supra*. Under a similar New South Wales act it has been held that such preference will be decreed as a matter of course whenever the Association substantially represents the employees of an industry. Trolley Draymen and Carriers Union *v.* Master Carriers Ass'n, 4 N. S. W. A. R. 38.

[1] Generally lay witnesses who have seen the reputed author write, or whose business experience has acquainted them with his hand, are permitted to express their opinion as to the authenticity of the disputed signature. Keith *v.* Lothrop, 64 Mass. 453; Hammond *v.* Varien, 54 N. Y. 398; Hammond's Case, 2 Me. 33.

[2] See Browning *v.* Gosnell, 91 Ia. 448, 458, 59 N. W. 340, 344.

[3] A statement of the facts of this case appears in RECENT CASES, p. 708.

[4] Such an experiment is an equally thorough test of the merit of the expert witness. See Hoag *v.* Wright, 174 N. Y. 36, 43, 66 N. E. 579, 581. Rarely is a problem which so thoroughly tests the witness's ability to deal with the matter in hand, united with so infallible a basis for determining the correctness of his answer.

[5] The only other possible way of estimating the lay witness's ability is on the basis of former instances of his skill. Even in the rare cases where such instances exist, such a basis has many objectionable features from which the court-room test is free. See 2 WIGMORE, EVIDENCE, § 1005 *d*. The situation as to the expert is almost identical. As the identification of handwriting is not recognized as a distinct profession, little can be learned from the professional reputation of the witness. An examina-

writing by such a witness requires neither lengthy processes nor any special apparatus,[6] no practical obstacle exists to his making a satisfactory judgment in the court room. The discretion of the trial judge will insure that the test is fairly undergone, and that the witness is not forced to give decisions under conditions dissimilar from those under which his decision concerning the disputed signature was made. The not uncommon assertion that a non-expert witness "cannot be expected to withstand the ordeal of such examination," [7] by showing that such opinion evidence ordinarily has but little merit, only emphasizes the need for giving to the jury the one satisfactory means available for estimating its true value.

Although the desirability of this method of cross-examination is clear, it is necessary to see if its use is opposed to any of the devious legal technicalities concerning comparison of writings. As the test is not based on comparison by juxtaposition, but upon the identification of a signature by means of the mental image in the witness's mind, exactly as in the direct examination, no difficulty arises from the rule forbidding all comparison of signatures by a lay witness.[8] To be sure, any further difficulties which might arise from the various rules restricting the introduction of extraneous specimen signatures could be avoided by limiting the specimens used to those proper for the purpose of the direct examination; but to confine the specimens used to these necessarily genuine signatures would be all but to destroy the efficacy of the test.[9] In jurisdictions where any signatures are admissible for the purposes of the direct examination, if proved authentic by direct evidence to the satisfaction of the trial judge,[10] no objection on principle can be raised to the utilization for impeachment of other signatures, forged as well as genuine, if the character of each is proved to the court. If the nature, true or false, of each specimen is known before the test, there can be no danger of collateral issues arising. The discretionary powers of the trial judge will be a sufficient guard against surprise or unfairness in the choice of specimens [11] — an unfairness which is unlikely anyway in the case of the false signatures, since the more carefully the forgeries are made

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tion as to scientific understanding is of little avail, as the expert does not to any large extent apply the principles of any science but rather affords the jury the benefit of skilled observation.

[6] The apparatus of the expert, even, consisting as it does essentially of microscopes and measuring instruments, is such as is perfectly capable of use in court.

[7] See the principal case, p. 44; Andrews *v.* Hayden's Adm'rs, 88 Ky. 455, 459, 11 S. W. 428, 430.

[8] Garrels *v.* Alexander, 4 Esp. 37; Travis *v.* Brown, 43 Pa. 9. *Contra*, Vinton *v.* Peck, 14 Mich. 287. And with the expert also, since his direct testimony is based on comparison, no objection on this score can arise to his being required to juxtapose the same standard signatures with test specimens on the cross-examination.

[9] Counsel have made ingenious attempts to apply the test without proving the authorship of extraneous specimens, by endeavoring to secure disagreement among the opponent's witnesses or conflicting opinions from the same witness, concerning the authorship of a single signature; or by seeking to induce the witness to deny an admittedly authentic signature by interchanging it with unproven specimens. But as these tests depend for their success upon tricking the witness rather than causing him to undergo a searching examination, they are obviously unsatisfactory. See 3 WIGMORE, EVIDENCE, § 2015 (1).

[10] Moody *v.* Rowell, 17 Pick. (Mass.) 490; Koons *v.* State, 36 Oh. St. 195, 199.

[11] See Hoag *v.* Wright, 174 N. Y. 36, 43, 66 N. E. 579, 581.

the more thoroughly will they test the witness's ability to detect them.[12] Many jurisdictions, however, for fear of collateral issues or unfairness, arbitrarily restrict the admission of specimens on the direct examination to those admitted to be genuine or those already in the case.[13] This rule of thumb, imperfect even for direct examination, cannot be meant to apply to cross-examination. Collateral issues would be avoided by the use of specimens admitted to be false as well as those admitted to be true, while the papers already in the case necessarily afford only genuine signatures. So, even in courts so limiting the juxtaposition of signatures on the direct examination, no insurmountable legal obstacle exists to the full use of this test of the witness.[14]

RECENT CASES

ABATEMENT AND REVIVAL — SURVIVAL OF ACTION — BREACH OF PROMISE OF MARRIAGE: SPECIAL DAMAGES. — In an action for breach of promise to marry, the plaintiff alleged as special damages that she gave up a business in which she was engaged, in consideration of the defendant's promise to marry her. Before the pleadings were delivered the defendant died. *Held*, that the action cannot be maintained against the executor. *Quirk* v. *Thomas*, 31 T. L. R. 237 (K. B.).

Lord Ellenborough's *dictum* that an action for breach of promise of marriage will survive against an executor if there are special damages has been widely repeated in the books. See *Chamberlain* v. *Williamson*, 2 M. & S. 408, 411; *Stebbins* v. *Palmer*, 18 Mass. 71, 75. But what special damages will suffice for

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[12] Eccentric genuine signatures or genuine ones written especially for the occasion could be excluded here by the court as well as in direct examination.

[13] The authorities on this point, which is largely governed by statute, are so diversified as to admit of no systematic classification. See 3 WIGMORE, EVIDENCE, §§ 2008, 2016, n. Three rules, however, may be taken as typical. (1) Comparison is not permissible. Gibson *v.* Trowbridge Co., 96 Ala. 357, 11 So. 365; Kinney *v.* Flynn, 2 R. I. 319. (2) Only specimens admitted to be genuine or already otherwise in the case may be used for comparison. Macomber *v.* Scott, 10 Kan. 335; Vinton *v.* Peck, 14 Mich. 287. (3) Signatures are admissible for comparison if proved to the satisfaction of the trial judge. See n. 10, *supra*.

[14] The authorities upon this point are extraordinarily confused. Though the case of the lay witness is in every respect more clear than that of the expert, it has been suggested that even where the test is allowed in the case of the expert, it cannot be applied to the lay witness. See Wilmington Savings Bank *v.* Waste, 76 Vt. 331, 336, 57 Atl. 241. But for the most part the question of whether the test is permissible is treated alike for both sorts of witnesses. See Page *v.* Homans, 14 Me. 478, 487; 3 WIGMORE, EVIDENCE, §§ 2014, 2015. In jurisdictions where extraneous specimens are provable for the purpose of the direct examination, the use of forged signatures in cross-examination has several times been allowed. Hoag *v.* Wright, 174 N. Y. 36, 66 N. E. 579; Browning *v.* Gosnell, 91 Ia. 448, 59 N. W. 340. But see Andrews *v.* Hayden's Adm'rs, 88 Ky. 455, 11 S. W. 428. But in those jurisdictions which do not allow the proof of extraneous specimens for the purposes of the direct examination, the decisions do not permit the proof of such specimens for impeachment. Gaunt *v.* Harkness, 53 Kan. 405. However, some of the jurisdictions which forbid the proving of extraneous specimens for the purpose of the cross-examination permit the test if made exclusively with unproven signatures and those employed in the direct examination. Johnston Harvester Co. *v.* Miller, 72 Mich. 265, 40 N. W. 429. *Cf.* Howard *v.* Patrick, 43 Mich. 121, 5 N. W. 84.